IN RE BECKMAN PRODUCTION SERVICES

UIC Appeal No. 98–4

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided May 14, 1999

Syllabus

Petitioner Beckman Production Services ("Petitioner") filed a Petition for Review of Permit No. MI–035–2d–C006 ("Final Permit") issued by the U.S. Environmental Protection Agency Region V ("the Region") to Petitioner. The Final Permit, issued under the Safe Drinking Water Act ("SDWA"), as amended, 42 U.S.C. § 300f *et seq.,* authorizes the continued operation of an existing underground injection control ("UIC") well located in Clare County, Michigan. The well is authorized, under the Final Permit, to dispose of fluids from oil and gas production operations ("E&P wastes") from the Greenwood and Headquarters oil fields. The UIC well, named Corlew #1–3, is classified as a Class II well under the regulations implementing the SDWA.

The Petition for Review raises the following issues as grounds for review of the Region's decision: 1) the permit provision regarding the purpose of the permit contains language objectionable to Petitioner; 2) the Region lacks authority to require thirty-day notification for planned changes and anticipated noncompliance; 3) the Final Permit imposes without prior notice to Petitioner a requirement that Petitioner "construct a fence with a padlock gate around the facility," in violation of Petitioner's right to due process; 4) the Region's interpretation of the word "source" as used in the permit has no basis in the UIC regulations; 5) the chemical analysis required by the Region is inappropriate; 6) the Region cannot require Petitioner to submit to minor modification procedures; and 7) the Region lacks authority to impose a thirty-day advance notification for permit transfers.

Held: With regard to the provision directing that the permittee request a minor permit modification in getting approval for new sources of waste, the Board concludes that it was inconsistent with the applicable regulations to require the permittee to submit to minor permit modification procedures without the permittee's consent. Accordingly, the permit is remanded to the Region on this point with the direction to strike the term "minor" from the reference to "minor permit modification" in Part I(E)(18)(b) of the permit. With respect to the requirement for chemical analysis in Part I(E)(18)(b) of the permit, and the requirement in Part I(E)(9)(c) for thirty-days advance notice of permit transfers, the Board concludes that the Region did not provide an adequate rationale in support of the contested permit terms. Therefore, the permit is remanded to the Region on these points with the direction to reopen the permit proceedings for the purpose of clarifying its bases for these requirements or modifying the requirements, as appropriate. In all other respects, the Petition for Review is denied.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

I. *BACKGROUND*

Petitioner Beckman Production Services ("Petitioner") filed a Petition for Review ("Petition 98–4") of Permit No. MI–035–2d–C006 ("Final Permit") issued by the U.S. Environmental Protection Agency Region V ("the Region") to Petitioner. The Final Permit, issued under the Safe Drinking Water Act ("SDWA"), as amended, 42 U.S.C. § 300f *et seq.,* authorizes the continued operation of an existing underground injection control ("UIC") well located in Clare County, Michigan. The well is authorized, under the Final Permit, to dispose of fluids from oil and gas production operations ("E&P wastes") from the Greenwood and Headquarters oil fields. The UIC well, named Corlew #1–3, is classified as a Class II well[1] under the regulations implementing the SDWA.[2]

The Region issued a draft permit for Corlew #1–3 on January 20, 1998, and solicited public comment for thirty days. Petitioner requested, and the Region granted, an extension of the public comment period to March 15, 1998. On March 12, 1998, Petitioner commented on the draft permit. No other party commented on the draft permit. The Region responded to the comments and issued the Final Permit on April 22, 1998. Petition 98–4 was filed with the Board on May 13, 1998, and the

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[1] Class II wells are defined as:

(b) * * * Wells which inject fluids:

(1) Which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection.

(2) For enhanced recovery of oil or natural gas; and

(3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

See 40 C.F.R. §§ 144.6(b), 146.5(b).

[2] Regulations implementing the underground injection control portion of the SDWA relevant to this appeal are found at 40 C.F.R. Parts 144, 146 and 147.

Region submitted a Response to the Petition ("Response 98–4") on July 2, 1998. *See* 40 C.F.R. § 124.19 (Appeal of RCRA, UIC, and PSD Permits). Petitioner filed a Motion to File Reply on July 24, 1998, which the Region opposed on August 7, 1998.[3]

II. *DISCUSSION*

A. *Standard of Review*

Under the rules that govern this proceeding, a UIC permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19(a). The preamble to section 124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * * ." *See* 45 Fed. Reg. 33290, 33412 (May 19, 1980). The Board has reaffirmed these policies on numerous occasions, and most recently in *In re Environmental Disposal Systems, Inc.,* 8 E.A.D. 23, 25 (EAB 1998) (citing *In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 567 (EAB 1998)). The Petitioner has the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a); *In re Environmental Disposal Systems* at 4 (citing *In re Envotech, L.P.—Milan, Michigan,* 6 E.A.D. 260, 265 (EAB 1996)).

Petitioner raises a number of objections to the Region's permit decision.[4] After careful consideration of the arguments raised in Petition 98–4, Response 98–4, and the portions of the Administrative Record provided

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[3] The Board, by this order, denies Petitioner's Motion to File Reply. Petitioners are required to file "all reasonably available arguments supporting their position by the close of the public comment period." 40 C.F.R. § 124.13. We find that the additional factual material submitted by Petitioner in its proposed reply brief and accompanying affidavit were reasonably ascertainable prior to the close of comment and prior to filing Petition 98–4. Accordingly, Petitioner's motion to file a reply is denied, and the reply brief and affidavit are stricken from the record.

[4] Petition 98–4 raises two issues on which we deny review because they simply reiterate Petitioner's previous objections to the draft permit without demonstrating why the Region's responses to these objections were in error. As the Board has previously stated:

> A petitioner may not simply reiterate its previous objections to the draft permit. Rather, "a petitioner must demonstrate why the Region's response to those objections * * * is clearly erroneous or otherwise warrants review." *In re Envotech,*

Continued

for the Board's consideration in this case, the Board remands several of these issues to the Region and denies review on the remainder.

B. *Bases for Review*

1. *Permit Part II(A)(5)—Site Security*

Petitioner argues that Final Permit Part II(A)(5) imposes without prior notice to Petitioner a requirement that Petitioner "construct a fence with a padlock gate around the facility," in violation of Petitioner's right to due process. *See* Final Permit at 10; Petition 98–4 at 11. Petitioner also contends that the fencing requirement is "vague and ambiguous." *Id*. The Region counters that this issue cannot be appealed by Petitioner because it has not been preserved for review. Response 98–4 at 18.

The procedures for UIC permit decisions are found in 40 C.F.R. Part 124. Section 124.13 provides in pertinent part:

> All persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10.

40 C.F.R. § 124.13.

L.P.—Milan, Michigan, 6 E.A.D. 260, 268 (EAB 1996) (quoting *In re LCP Chemicals—New York,* 4 E.A.D. 661, 664 (EAB 1993)).

In re Austin Powder Co., 6 E.A.D. 713, 721 (EAB 1997).

First, Petitioner takes issue with the following permit provision, "The purpose of the injection is for commercial disposal of fluids related to the production of oil and gas *as approved by the Director*." Final Permit at 1 (emphasis added). Second, Petitioner asserts that the Region lacks authority to require thirty-day notification for planned changes and anticipated noncompliance. *See* Final Permit Part I(E)(9)(a)–(b).

Again, because Petitioner does not indicate why the Region's prior responses on these issues were either clearly erroneous or otherwise warrant review, Petition 98–4 is denied as to these issues.

In addition, section 124.19(a) provides in pertinent part:

> * * * any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. * * * The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations * * * .

40 C.F.R. § 124.19(a).

These requirements ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final. Thus, as a threshold matter, the Board must determine whether Petitioner has satisfied the requirements of §§ 124.13 and 124.19(a) in order to preserve the issues presented for review. As noted above, the Region contends that Petitioner failed to do so on this issue. We agree.[5]

Petitioner states that the fencing requirement in Part II(A)(5) of the Final Permit, entitled "Site Security," was not included in the draft permit. If this were true, it would be entirely appropriate for Petitioner to raise this issue as part of its appeal. Contrary to Petitioner's assertion, however, the Region's draft permit did contain the fencing requirement. Part II(A)(4) of the draft permit, entitled "Wellhead Specifications," provided in pertinent part:

> * * * In order to prevent any illegal dumping into the injection well, the operator must install padlocks at the wellhead on the master valve and *construct a fence with a padlocked gate around the facility* to preclude access of unauthorized personnel.

Response 98–4, App. A at 10 (draft permit) (emphasis added).

Petitioner submitted comments on the draft permit to the Region by letter dated March 12, 1998.[6] Petition 98–4 at 2. The Region responded to

[5] The Board notes that the record reflects that each of the other issues discussed herein was properly preserved for review.

[6] A copy of the March 12, 1998 comments were not provided as a part of the briefing in this case.

Petitioner's comments by correspondence on April 14, 1998.[7] *Id.* The Region's summary of Petitioner's comments regarding Part II(A)(4) of the draft permit state only that with regard to the fencing requirements, "Beckman agrees to site security by locking access gate from 11 pm to 5 am." Response 98–4, App. E at 9. The Region's response to comments related to Part II(A)(4) of the draft permit further explains that the Region modified this part of the draft permit by "dividing the original II(A)(4) into two parts: II(A)(4) *Wellhead Specifications* and II(A)(5) *Site Security* * * *." *Id.* at 10 (emphasis in original).

Thus, the fencing requirements in the Site Security provisions of the Final Permit were contained in the draft permit under the "Wellhead Specifications" heading. Since Petitioner did not object to the fencing requirements contained in Part II(A)(4) of the draft permit by the close of the comment period, Petitioner failed to preserve the issue for review. Accordingly, the Board denies review on this issue.

2. *Permit Part I(E)(18)(b)—Approval of New Sources*

Petitioner's principal contention in this case is that the Region has no regulatory authority to impose the permit condition at Part I(E)(18)(b) of the Final Permit. Part I(E)(18)(b) of the permit provides:

> Approval of New Sources—Prior to accepting any new source of brine for disposal into the injection well, the operator must submit a request for a minor permit modification to include the new source in Part III(D) of the permit and must also submit a complete chemical analysis for each of the parameters listed in Part III(A) to the [Region] for approval. The permittee may not inject fluids from the new source until the minor modification to the permit is effective.

Final Permit at 9. Petitioner has raised three issues with respect to this provision: a) the permit condition reflects an impermissible interpretation of the regulatory term "source;" b) the chemical analysis required by the provision is inappropriate and thus inconsistent with the regulations; and c) the provision should not reference minor permit modifications since

[7] The Region provided a copy of its "Response to Comments" as Appendix E to Response 98–4.

Petitioner has not consented to the use of minor permit modifications for the purpose of accepting new sources of injection fluid.[8]

The Region relies on 40 C.F.R. §§ 146.24(a)(4)(iii) and 144.41(e) as the controlling regulatory authorities for this permit condition. Section 146.24(a)(4)(iii) provides, in pertinent part:

> (a) Prior to the issuance of a permit for an existing Class II well to operate * * * the Director shall consider the following: * * * (4) Proposed operating data: * * * (iii) Source and an appropriate analysis of the chemical and physical characteristics of the injection fluid.

40 C.F.R. § 146.24(a)(4)(iii).

Section 144.41(e) states:

> Upon the consent of the permittee, the Director may modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of Part 124. * * * Minor modifications may only * * * Change quantities or types of fluids injected which are within the capacity of the facility as permitted and, in the judgment of the Director, would not interfere with the operation of the facility or its ability to meet conditions described in the permit and would not change its classification.

40 C.F.R. § 144.41(e).

We address Petitioner's issues in turn.

a. *Definition of Source*

Petitioner argues that the Region's interpretation of the word "source" as used in the permit "has no basis in the CFRs." Petition at 4.

[8] In raising its concern about being forced to "volunteer" its consent in the permit, Petitioner directs the Board to a general reference to 40 C.F.R. § 144.41(e) (Minor modifications of permits) on page one of the permit, rather than to Part I(E)(18)(b) of the permit. Based on our review, we believe that Petitioner's concern regarding the reference to 40 C.F.R. § 144.41(e) only becomes meaningful in the context of Part I(E)(18)(b), where the Region establishes minor permit modifications as the exclusive vehicle for adding new sources to the permit.

Petitioner suggests that "source" refers to the general classification of E&P wastes. In support of its interpretation, Petitioner submitted to the Region, a list of "sources excluded in 40 CFR 261.4(b)(5)." *See* Letter from Richard E. Hinkley, Engineer to Stephen Roy, PhD at 2 (March 10, 1995).

The Region, on the other hand, has interpreted the term "source" as used in the permit and under 40 C.F.R. § 146.24(a)(4)(iii) as a:

> geologic source of brine, generally a specific formation in a specific location usually a field or portion of a field as defined by the State of Michigan.

See Response 98–4 at 6; Response to Comments at 2.[9] The Region contends that since there is no regulatory definition of "source" in the applicable UIC regulations,[10] the Region's interpretation cannot be inconsistent with the regulations, and that the Region's interpretation is logical and entitled to deference. *See* Response 98–4 at 6.

The Board finds Petitioner's interpretation of the word "source" to be unpersuasive. The Petitioner interprets the term to mean:

> Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy.

See 40 C.F.R. § 261.4(b)(5) (Solid wastes which are not hazardous wastes). A more conventional definition of "source" is:

> The rising from the ground, or beginning, of a stream of water or the like; a spring; a fountain. * * * That from which anything comes forth, regarded as its cause or origin; * * * first cause.

See Webster's Revised Unabridged Dictionary (1998).

The Region's interpretation, which includes the geologic location from which the injected fluids originate, is entirely consistent with the conventional meaning of the term "source" as defined above; indeed,

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[9] The Region's interpretation of "source" is not contained in the Final Permit itself, rather it is articulated in the Region's Response to Comments.

[10] Petitioner agrees that the word "source" is not defined in the regulations applicable to UIC wells. *See* Petition 98–4 at 4.

reading the term "source" to include a dimension of origin or location for the waste to be injected strikes us as the better reading of the permit condition, and corresponding regulation, in question. Petitioner's construction of the term focuses on the *nature* or type of fluids to be injected, and as such renders the term largely meaningless in view of the other clause in section 146.24(a)(4)(iii) mandating that the Director also consider information regarding "the chemical and physical characteristics of the injection fluid." *See* 40 C.F.R. § 146.24(a)(4)(iii). Under well accepted canons of construction, a rule should be read in a manner that gives effect to all of its parts rather than in a way that renders some of its terms meaningless or redundant. *See Colautti v. Franklin,* 439 U.S. 379, 392 (1979), *overruled in part on other grounds by, Webster v. Reproductive Health Services,* 492 U.S. 490 (1989).

Petitioner argues that the Region's interpretation of the term "source" is entitled to no deference in this proceeding because states in Region V and other Regions may have applied the regulation in a way that reflects a different interpretation than the one advanced by Region V here. Those other applications are, of course, not before us, and our judgment here turns not on notions of deference to the Region's interpretation, but on our own view of the better reading of the regulation. As the permit condition under review here is consistent with that reading, and as Petitioner has not convinced us that the Region has committed clear error, we deny the petition for review on this issue.

b. *Appropriate Analyses*

Petitioner also takes issue with the chemical analysis required under Part I(E)(18)(b) of the Final Permit.[11] Petitioner argues that reliance on the generator's knowledge of waste, Michigan's existing manifest system, and grab samples[12] of the E&P waste to be injected satisfy the purpose that

[11] The specific parameters of the chemical analysis required by the Region are listed in Part III(A) of the Final Permit as follows:

> Chemical composition analysis shall include, but not be limited to, the following: Sodium, Calcium, Magnesium, Barium, Total Iron, Chloride, Sulfate, Carbonate, Bicarbonate, Sulfide, Total Dissolved Solids, pH, Resistivity (ohm-meters @ 75%F), and Specific Gravity.

Final Permit at A–1.

[12] The record reflects that the Region incorporated Petitioner's recommended "grab sampling" on a quarterly basis as a permit condition. *See* Final Permit at A–1.

the Region has proffered for the chemical analysis required by the permit. *See* Petition 98–4 at 4–5. Petitioner also contends that the analysis required will not detect whether the fluids are E&P waste, and thus the analysis is not meaningful. Petition 98–4 at 6. The Region has stated that the chemical analysis is intended to "insure that only appropriate fluids [are] injected" into the well, that generator information derived from the manifest system is by itself insufficient to support UIC regulatory program administration, and that the absence of "a minimal amount of information about a brine before it is injected underground" might allow non-compliance to "go undiscovered * * * for many months." *See* Response to Comments at 5.

While Petitioner has not convinced us that reliance on the manifest system[13] is sufficient to ensure that E&P wastes are injected into Corlew #1–3, or that the chemical testing required under the permit will not supply needed data, the record, as currently constituted, is insufficient in explaining the need for the chemical analysis required under the Final Permit. The record simply does not set forth the reasons why Michigan's manifest requirements will not satisfy the need for chemical analysis or meaningfully explain how the parameters for which testing is required are related to the Region's goal of ensuring against injection of inappropriate wastes. Therefore, we are remanding the portion of Part I(E)(18)(b) of the Final Permit requiring chemical analysis to the Region so that it may reopen the permit proceedings to supplement its response to comments with a clearer rationale or to modify the requirement, as appropriate.

c. *Minor Permit Modifications*

We can understand why in Part I(E)(18)(b) of the permit the Region contemplated the use of minor permit modification procedure under 40 C.F.R. § 144.41(e). The minor permit modification provisions appear to have been designed to accommodate relatively minor changes like the

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[13] Under Michigan law, the wastes that Petitioner is authorized to dispose of are classified as liquid industrial wastes. *See* Mich. Comp. Laws. §§ 324.12101(a), (k) (1998). Generators of liquid industrial wastes are required to fulfill manifest requirements outlined under Michigan's hazardous waste regulations. *See id.* § 324.12103(1)(d) (1998). Those manifest requirements are set forth at Mich. Admin. Code r. 299.9101 (1998). In particular, a generator must provide:

> The description of the waste required by regulations of the [Department of Transportation] in the provisions of 49 C.F.R. §§ 172.101, 172.202, and 172.203 * * *

Mich. Admin. Code r. 299.9304(2)(e) (1998).

addition of new sources of E&P waste, and offer to the permittee an economical alternative to the more extensive permit modification procedure that would otherwise obtain. Nevertheless, there is an important qualification to the use of minor permit modifications—they require consent of the permittee. Petitioner argues that they have not given their consent to the use of minor permit modifications for purposes of new source approvals. The Region, while forcefully arguing that a permit modification of some kind is required for adding new sources, a position with which we agree, has not disputed Petitioner's contention that it has not given consent to the minor permit modification process.

Given that 40 C.F.R. § 144.41(e) clearly requires such consent as a condition precedent, we agree with Petitioner that it was error for the Region to direct in Part I(E)(18)(b) of the permit that the minor permit modification procedure be followed. Accordingly, we remand this issue to the Region with instructions that the reference to the term "minor" be stricken from Part I(E)(18)(b). Whether the permit modification necessary to effectuate the addition of new sources will be "minor" or not will depend on Petitioner's willingness to consent to minor permit modification procedure at the time it seeks to accept waste from a new source.

3. *Permit Part I(E)(9)(c)—Transfer Notification Requirement*

Permit Part I(E)(9), entitled "Notification Requirements," requires Petitioner to provide at "least thirty (30) days notice" for "(c) Transfer of Permits." *See* Final Permit at 5. Petitioner objects to the thirty-day advance notification requirement of Final Permit Part I(E)(9)(c), arguing that there is no regulatory basis for the provision, except in the case of automatic transfers governed by 40 C.F.R. § 144.38(b). Petition 98–4 at 10–11. Petitioner argues that the Region's Response to Comments on this issue cites inapplicable regulations at 40 C.F.R. § 144.28 regarding transfers of wells authorized by rule. *Id.* While the Region's Response to Comments explained that 40 C.F.R. § 144.38 provides for two types of transfers: 1) transfers by modification, and 2) automatic transfers, Response to Comments at 9, and the Region pointed out that the automatic transfer regulations contain a thirty-day advance notice requirement, *id.,* the Region appeared to rely on the provision for rule-authorized wells at 40 C.F.R. § 144.28(l)(1) (Change of ownership or operational control) as the

controlling authority for imposing the thirty-day advance notice under Final Permit Part I(E)(9)(c).[14] Response to Comments at 9.

In its Response to the petition for review, the Region appears to have abandoned the rationale articulated in the Response to Comments, and argues instead that 40 C.F.R. § 144.52(b)(1) provides the necessary authority by which the thirty-day notice requirement may be imposed.[15] Response 98–4 at 17. The record before us thus reflects that the Region has provided two different reasons for imposing the thirty-day notification requirement for permit transfers; therefore, we cannot determine with sufficient certainty the actual basis for the Region's determination. *See In re Austin Powder Co.,* 6 E.A.D. 713, 719 (EAB 1997). Accordingly, this issue is remanded to the Region so that it may reopen the permit proceedings to clarify the basis for this requirement in its Response to Comments or modify the requirement, as appropriate. *See Austin Powder* at 720, citing *In re GSX Services of South Carolina, Inc.,* 4 E.A.D. 451, 454 (EAB 1992) (administrative record must reflect the "considered judgment" necessary to support the Region's permit determination).

III. *CONCLUSION*

The permit is remanded to the Region with the following instructions. With respect to the reference to "minor permit modification" in Part I(E)(18)(b) of the permit, the Region is directed to strike the term "minor" from the reference. With respect to the requirement for chemical analysis in Part I(E)(18)(b) of the permit, and the requirement in Part I(E)(9)(c) for thirty-day advance notice of permit transfers, the Region is directed to reopen the permit proceedings for the purpose of clarifying its bases for

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[14] The regulation titled "Requirements for Class I, II and III wells authorized by rule" provides in pertinent part:

> The transferor of a Class I, II or III well authorized by rule shall notify the Regional Administrator of a transfer of ownership or operational control of the well at least 30 days in advance of the proposed transfer.

40 C.F.R. § 144.28(l)(1).

[15] Section 144.52(b)(1) states:

> In addition to conditions required in all permits the Director shall establish conditions in permits as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the SDWA and parts 144, 145, 146 and 124.

40 C.F.R. § 144.52(b)(1).

these requirements or modifying the requirements, as appropriate.[16] Appeal of the remand decision will not be required to exhaust administrative remedies under 40 C.F.R. § 124.19. In all other respects, Petition 98–4 is denied.

So ordered.

[16] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues addressed on remand. *See,* e.g., *In re General Motors Corp.,* 5 E.A.D. 400, 414 n.21 (EAB 1994).